

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Implementation of the)	CC Docket No. 96-128
Pay Telephone Reclassification)	
and Compensation Provisions of)	
the Telecommunications Act of 1996)	
)	
Petition for Further Reconsideration)	
of the Inmate Calling Service)	
Providers Coalition)	
)	

**OPPOSITION OF CITIZENS UNITED FOR THE REHABILITATION OF
ERRANTS**

The Citizens United for the Rehabilitation of Errants (“CURE”) hereby submits its comments in opposition to the Petition for Further Reconsideration (“Petition”) filed by the Inmate Calling Service Providers Coalition (“ICSPC”) in the above-captioned proceeding.^{1/}

INTRODUCTION AND SUMMARY

The Commission has now twice considered arguments by inmate calling service (“ICS”) providers that state limitations on rates deny them fair compensation under Section 276 of the Communications Act of 1934 (“The Act”), and the Commission has now twice rejected these claims in well-reasoned decisions. ICSPC raises no new issues

^{1/} Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, *Order on Remand & Notice of Proposed Rulemaking*, FCC 02-39 (rel. Feb. 21, 2002) (“*Order on*

that merit further reconsideration of this issue and, accordingly, the Commission should deny ICPSC's most recent iteration of these claims.

As the Commission correctly determined in the *Order on Remand*, Section 276 does not require preemption of state rate caps on local collect calls, nor does it entitle ICS providers to impose a surcharge above state rate caps on such calls. Section 276 merely requires that the Commission establish a "per call compensation plan" that ensures that pay phone providers "are fairly compensated for each and every call" made using their services, and does not dictate how the Commission should reach that goal. The Commission's standard for determining fair compensation appropriately looks to the ability of ICS providers to recover their aggregate costs, and refrains from imposing upon either the providers or the correctional institutions any particular methodology. Instead, the Commission relies on the market to determine the precise terms and nature of contracts between ICS providers and correctional institutions, whenever possible, in furtherance of the deregulatory and pro-competitive goals of the Act. The *Order on Remand* properly allows these contracts to be negotiated freely while protecting end users from the even more excessive rates likely to result from the monopolistic environment stemming from the award of the contracts to single providers.

To the extent that any concerns regarding the compensation scheme for ICS providers still exist, however, those concerns are more appropriately addressed through the Notice of Proposed Rulemaking ("*NPRM*") issued in conjunction with the *Order on Remand*. Although CURE certainly agrees that correctional facility "commissions" should be restricted because they result in excessive rates to end users, this issue has been

Remand" or "*NPRM*").

raised in the *NPRM*, and such a format will allow thorough exploration of the problems and potential solutions. Similarly, any remaining concerns regarding cost recovery – which are intensely factual – are better resolved through a rulemaking rather than the sort of narrow legal review conducted here. Accordingly, the Commission should reject ICSPC’s Petition.

I. ICS PROVIDERS HAVE NOT DEMONSTRATED THAT THEY ARE NOT RECEIVING FAIR COMPENSATION UNDER SECTION 276 OF THE ACT

Section 276 is not intended to supplant the generally accepted proposition that contracts voluntarily negotiated between parties are presumptively fair. Indeed, among the Act’s primary goals were the deregulation of the telecommunications industry and an expanded reliance on the free market to determine the proper pricing of products and the allocation of resources. As the Commission concluded in the *Order on Reconsideration*, “whenever a [provider] is able to negotiate for itself the terms of compensation for the calls its payphones originate, then [the Commission’s] statutory obligation to provide fair compensation is satisfied.”^{2/} Thus, rates arrived at through voluntary negotiation should be considered presumptively fair.

To the extent ICS providers believe that a particular state’s rate caps prevent them from earning a fair return they can decline to bid on the proposed contracts. Notably, despite their claims of lost revenue, it does not appear that many ICS providers have

^{2/} Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, *Order on Reconsideration*, FCC 96-439, ¶ 72 (rel. Nov. 8, 1996).

chosen this approach.^{3/} Rather, they voluntarily enter into contracts and then ask the Commission to add new terms, in the form of surcharges or complete preemption, to the agreements.

In any event, in response to ICS providers' petitions, the Commission again examined carefully ICS providers' cost claims and found them to be unpersuasive. Supplementing its prior determination regarding the importance of voluntary negotiation to the determination of whether compensation is fair,^{4/} the Commission clearly explained the meaning of Section 276's fair compensation requirement. It concluded that this provision does not require the Commission to ensure that each and every call makes an identical contribution to shared and common costs, but merely requires that the ICS providers' aggregate costs be recovered.^{5/} Accordingly, based upon the extensive record and arguments before it, the Commission reasonably concluded that an ICS provider will be deemed to receive fair compensation unless it can demonstrate that "(i) revenue from its interstate or intrastate calls fails to recover for *each* of these services both its direct costs and some contribution to common costs, or (ii) the *overall* profitability of its payphone operations is deficient because the provider fails to recover its total costs from its aggregate revenues (including both revenues from interstate and intrastate calls)."^{6/}

^{3/} Indeed, as the Commission notes, new providers are eager to enter the market. *Order on Remand* ¶ 39 ("While the Coalition contends that service could be threatened or is dwindling, numerous commenters that provide payphone service state that they are, in fact, adequately compensated for inmate calls, and they should be able to provide service in the event that the Coalition members cannot.").

^{4/} See NPRM at ¶ 7.

^{5/} *Id.* at ¶ 23

^{6/} *Id.* (original emphasis).

Despite multiple opportunities to present their position, the ICS providers failed to make the necessary showing, and the Commission properly refused ISPCS's request to preempt state ceilings.^{7/} It should do so now again.

In addition, the Commission previously rejected the ICS providers' proposal that they be allowed to impose a \$.90 surcharge for inmate calls. The Commission concluded that proxies may only be used as the basis to set compensation under limited circumstances not present here and a national surcharge on local inmate calls would result in excessive recovery.^{8/} Nothing has occurred in the meantime that would warrant a change in the Commission's position.

Moreover, the Commission determined that even if the relief proposed by ICSPC were granted, it would be unlikely to actually provide ICS providers with additional revenues because those revenues would be captured by locational monopolies through increased facility commissions.^{9/} As CURE has emphasized on numerous occasions, unless limits are placed on such commissions and on the rates charged by ICS providers, end users will be required to pay even more exorbitant rates without furthering the statutory fair compensation requirement relied upon by ICS providers as the basis for imposing additional charges.^{10/}

In sum, the Commission's cost standard for implementing Section 276 should be reaffirmed because it furthers the deregulatory and pro-competitive goals of the Act by

^{7/} *Id.* at ¶ 24

^{8/} *Id.* at ¶ 25-26.

^{9/} *Id.* at ¶¶ 27-29.

^{10/} *Id.* at ¶¶ 27-29.

allowing parties the maximum flexibility in determining the terms of their own contracts and promotes the public interest by restraining the charges imposed on end users subject to a monopoly regime.^{11/} ICS providers have failed, for the third time, to demonstrate that they are being denied fair compensation under Section 276, and the Commission should again deny their requests for preemption of state rate caps and the right to impose a surcharge on end users.

II. ICS PROVIDER CONCERNS ARE MORE APPROPRIATELY ADDRESSED IN THE COMMISSION'S PENDING *NPRM*

The Commission is currently reviewing comments filed in response to the *NPRM* issued in conjunction with the *Order on Remand*, which comprehensively addresses inmate payphone issues.^{12/} The *NPRM* is broadly designed to explore whether the current regulatory regime applicable to the provision of inmate calling services is responsive to the needs of correctional facilities, inmate calling service providers, and inmates, and, if not, whether and how the Commission might address those unmet needs.^{13/} The *NPRM* solicits comments on rates, provider costs, commission payments, state rate caps, alternatives to the current system, and potential cost-reduction measures. Accordingly, there is no reason to reopen the issues the Commission resolved through the *Order on Remand*.

^{11/} As CURE has noted throughout this proceeding, state rate caps are the only check on unjust and unreasonable rates. These caps were generally put in place either because of excessive rates or blatantly appalling provider practices such as charging more than the stated rate. It should be noted that the Commission's *Order on Remand* does not prevent ICS providers from filing complaints if they believe that a particular state rate cap truly denies "fair compensation" under Section 276.

^{12/} Petition at 17.

^{13/} *NPRM* ¶ 72.

CONCLUSION

The *Order on Remand* was a well-reasoned decision based on the record, the law, and the public interest, and should be reaffirmed.

Respectfully submitted,

CITIZENS UNITED FOR REHABILITATION OF ERRANTS

By: /s/ Christopher R. Bjornson

Catherine Carroll

Robert E. Stup, Jr.

Christopher R. Bjornson

MINTZ, LEVIN, COHN,

FERRIS,

GLOVSKY AND POPEO,

P.C.

701 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

(202) 434-7300

June 5, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June 2002, a true and correct copy of the foregoing
Comments of Citizens United for Rehabilitation of Errants, was sent via electronic mail or via
first-class U.S. mail(*) to:

Marlene H. Dortch, Esq.
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., 5th Floor
Washington, D.C. 20554

Qualex International
Portals II
445 12th Street, S.W.
CY-B402
Washington, D.C. 20036
qualexint@aol.com

Robert F. Aldrich*
Counsel for the Inmate Calling Service Providers
Coalition
Dickstein, Shapiro, Morin & Oshinsky LLP
2101 L Street, NW
Washington, D.C. 20037

/s/ Christopher R. Bjornson
Christopher R. Bjornson